

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
LAREDO DIVISION**

CESAR MONCIVAS,	§	
Petitioner	§	
VS.	§	CRIMINAL ACTION NO. L-03-1729
	§	CIVIL ACTION NO. L-05-36
USA,	§	
Respondent	§	

**ORDER**

Pending before this Court is petitioner Cesar Moncivas' Motion to File a Direct Appeal Out of Time filed on March 11, 2005 [Docket No. 41]; and Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 filed on February 25, 2005 [Docket No. 1]. Upon due consideration of the pleadings and legal authorities, for the reasons enumerated below, Petitioner's Motions are hereby DENIED.

**I. Motion to File a Direct Appeal Out of Time**

Petitioner Moncivas seeks to file a direct appeal of a judgment entered by this Court on April 28, 2004. Under most circumstances, an appeal must be filed within 10 days from the entry of judgment FED. R. APP. P. 4(B). Upon a finding of "excusable neglect" or "good cause", a court may, with or without motion, "extend the time to file a notice of appeal for a period not to exceed 30 days" from the expiration of the initial 10 days. FED. R. APP. P. 4(B)(4). Petitioner's judgment was entered more than a year ago. The time for appeal has long since passed.<sup>1</sup> Therefore, petitioner's motion is hereby DENIED.

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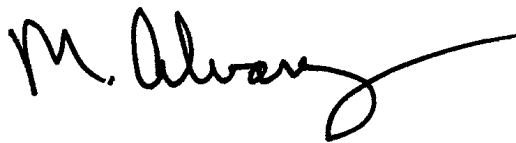
<sup>1</sup> Petitioner claims he instructed counsel to file a notice of appeal on the day of his sentencing and that counsel failed to do so. The Court notes that on the day of his sentencing, Defendant and his attorney signed and filed a Notice of Non-Appeal with the Court [Docket No. 34].

**II. Motion to Vacate, Set Aside or Correct Sentence**

Petitioner also contends that the sentence imposed by the district court is unconstitutional in light of *United States v. Booker*, 125 S. Ct 738(2005). The Court concludes that as a matter of law, Petitioner is not entitled to relief because *Booker* is not retroactive to defendants on collateral review. See *In re Elwood*, \_\_\_ F.3d \_\_\_, 2005 WL 976998 (April 28, 2005). The judgment in petitioner's case was entered against him on April 28, 2004, and he did not file a direct appeal. Petitioner's conviction was clearly final before the Supreme Court issued *Booker* on January 12, 2005. Because *Booker* is not retroactive, petitioner's § 2225 motion is hereby DENIED.

IT IS SO ORDERED

Done on this 1st Day of June, 2005 in Laredo, Texas

A handwritten signature in black ink, appearing to read 'M. Alvarez', with a long, sweeping horizontal line extending to the right.

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MICAELA ALVAREZ  
UNITED STATES DISTRICT JUDGE